

1 GLYNN & FINLEY, LLP
ADAM FRIEDENBERG, Bar No. 205778
2 ADAM M. RAPP, Bar No. 280824
One Walnut Creek Center
3 100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596
4 Telephone: (925) 210-2800
Facsimile: (925) 945-1975
5 Emails: afriedenberg@glynnfinley.com
arapp@glynnfinley.com
6

7 LAW OFFICE OF WILLIAM REILLY
WILLIAM B. REILLY, Bar No. 177550
8 86 Molino Avenue
Mill Valley, CA 94941-2621
9 Telephone: (415) 225-6215
Facsimile: (415) 225-6215
10 Email: bill@williamsbreilly.com

11 Attorneys for Plaintiffs
12

13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA

15 KIMBERLY CUSACK-ACOCCELLA,
an individual, SCOTT LANGER, an
16 individual, MICHAEL HENRY, an
individual, JANICE SMOTHERS, an
17 individual, and GRACE OUDIN, an
individual, on behalf of themselves
18 and on behalf of all others similarly
situated,
19

20 Plaintiffs,

21 vs.

22 DUAL DIAGNOSIS TREATMENT
23 CENTER, INC., a California
corporation doing business as
24 SOVEREIGN HEALTH, TONMOY
SHARMA, an individual, KEVIN
25 GALLAGHER, an individual, DAVID
TESSERS, an individual, and ALLIED
26 BENEFIT SYSTEMS, INC., an
Illinois corporation,
27

28 Defendants.

Case No.

COMPLAINT FOR BREACH OF
ERISA FIDUCIARY DUTIES AND
APPROPRIATE EQUITABLE
RELIEF

INTRODUCTION

1
2 1. Plaintiffs are former employees of Defendant Dual Diagnosis
3 Treatment Center, Inc. d/b/a Sovereign Health (“Sovereign”). Sovereign offered
4 health benefits to its employees through a self-funded plan, the Sovereign Health
5 Employee Benefits Plan (the “Plan”). Plaintiffs and other employees made
6 monthly premium payments via regular payroll deductions made by Sovereign,
7 which was responsible for funding the Plan and ensuring its ability to make
8 payments for covered health benefits. Sovereign, however, has ceased funding the
9 Plan, which has therefore ceased paying covered claims for benefits. On
10 information and belief, Sovereign and its senior executives have failed to hold Plan
11 assets, including but not limited to regular payroll deductions, in trust, as required,
12 but instead have misappropriated and misused Plan assets. As a result, Sovereign
13 and certain of its executives have stolen Plaintiffs’ wages and benefits and left
14 them vulnerable to substantial financial liability to their medical providers, which
15 the Plan was required to pay and/or reimburse for covered claims.

16 2. Defendant Allied Benefit Systems, Inc. (“Allied”) was the claims
17 administrator for the Plan. Allied was aware that Sovereign had ceased funding the
18 Plan and ceased paying claims. However, Allied did not notify Plaintiffs of this
19 failure. Instead, it made serial representations to Plaintiffs that the Plan had paid
20 claims that had not been paid, and that Allied knew had not been paid.

21 3. As a result of Defendants’ breaches of their obligations, Plaintiffs
22 have received collections notices from their doctors and other providers for
23 amounts owed by the Plan for covered health benefits. Neither Sovereign nor
24 Allied contends that the unpaid amounts are not owed, or that the benefits at issue
25 were not covered by the Plan—Sovereign simply refuses to fund the Plan as
26 agreed, leaving Sovereign’s current and former employees exposed to substantial
27 financial liability. Plaintiffs are informed and believe that covered claims in excess
28 of \$1.1 million remain unpaid. This amount continues to grow, as covered claims

1 continue to go unpaid, unwitting employees continue to seek and obtain medical
2 treatment without knowledge that the health benefits for which they have paid will
3 not be provided, and existing employees continue to be falsely informed that
4 continued payroll deductions are being used to fund the Plan.

5 **JURISDICTION AND VENUE**

6 4. This Court has subject matter jurisdiction under 29 U.S.C. §
7 1132(e)(1).

8 5. The Court has personal jurisdiction over all defendants named herein,
9 as all reside and/or do business in California and this District or otherwise have
10 sufficient contacts with the forum, as detailed below.

11 6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and
12 29 U.S.C. § 1132(e), as a substantial part of the acts or omissions giving rise to the
13 claims alleged herein occurred within this District, the Plan is administered in this
14 District and/or a defendant resides or may be found within this District.

15 **THE PARTIES**

16 7. Plaintiff Kimberly Cusack-Acocella is a former employee of
17 Sovereign, and was a participant in the Plan. Ms. Cusack-Acocella is a resident of
18 Texas. Ms. Cusack-Acocella is a Plan participant within the meaning of 29 U.S.C.
19 § 1002(7).

20 8. Plaintiff Scott Langer is a former employee of Sovereign, and was a
21 participant in the Plan. Mr. Langer is a resident of Massachusetts. Mr. Langer is a
22 Plan participant within the meaning of 29 U.S.C. § 1002(7).

23 9. Plaintiff Michael Henry is a former employee of Sovereign, and was a
24 participant in the Plan. Mr. Henry is a resident of California. Mr. Henry is a Plan
25 participant within the meaning of 29 U.S.C. § 1002(7).

26 10. Plaintiff Janice Smothers is a former employee of Sovereign, and was
27 a participant in the Plan. Ms. Smothers is a resident of Florida. Ms. Smothers is a
28 Plan participant within the meaning of 29 U.S.C. § 1002(7).

1 11. Plaintiff Grace Oudin is a former employee of Sovereign, and was a
2 participant in the Plan. Ms. Oudin is a resident of California. Ms. Oudin is a Plan
3 participant within the meaning of 29 U.S.C. § 1002(7).

4 12. Sovereign is a California corporation with its principal place of
5 business in San Clemente, California. Sovereign is the Plan Administrator for the
6 Plan, responsible for collecting monthly premiums and funding payments of all
7 covered benefit claims made under the Plan, and is therefore a fiduciary with
8 respect to the Plan under ERISA.

9 13. Plaintiffs are informed and believe and thereon allege that Allied is an
10 Illinois corporation with its principal place of business in Chicago, Illinois. Allied
11 is the Claims Administrator for the Plan, with authority to resolve and approve as
12 covered all benefit claims made under the Plan. On information and belief, Allied
13 has responsibility to pay benefits due under the Plan and controls and disburses
14 Plan assets, and is therefore a fiduciary under ERISA.

15 14. Defendant Tonmoy Sharma is the Chief Executive Officer of
16 Sovereign. Plaintiffs are informed and believe and thereon allege that he is a
17 resident of California. Plaintiffs are further informed and believe and thereon
18 allege that at all relevant times Mr. Sharma had and exercised control and authority
19 over the Plan and its assets, and is therefore a fiduciary with respect to the Plan
20 under ERISA.

21 15. At all relevant times, Sovereign was the alter ego of Sharma. A direct
22 or indirect unity of interest and ownership existed between Sovereign, on the one
23 hand, and Sharma on the other hand, such that adherence to the fiction of separate
24 corporate existence would promote injustice under these circumstances. The full
25 extent of Sharma's influence and control over Sovereign is within the exclusive
26 knowledge of Sharma. Mr. Sharma's alter ego liability is based on, *inter alia*, the
27 following factual allegations made on information and belief:

28 a. Sharma exercises day-to-day control over all Sovereign business

1 activities;

2 b. Sharma, directly or indirectly, owns a majority of outstanding
3 Sovereign stock;

4 c. Sharma dominated and controlled the affairs of Sovereign, using it as
5 a mere conduit for his personal financial interests;

6 d. Sharma disregarded the formal corporate existence of Sovereign by,
7 *inter alia*, paying for personal expenses unrelated to legitimate
8 corporate interests out of general corporate funds;

9 e. Sharma commingled Sovereign corporate assets with his own personal
10 funds and diverted Sovereign's income and assets, as well as Plan
11 assets, without regard to the corporate form;

12 f. Sharma personally benefitted from his disregard of Sovereign's
13 corporate form and repeated knowing misrepresentations to Sovereign
14 employees and Plan participants;

15 g. Sharma was personally involved in Sovereign's decisions to divert
16 employee payroll deductions specifically earmarked as Plan assets and
17 to refuse to fund the Plan as required;

18 h. Adherence to the fiction of separate corporate existence under the
19 circumstances would sanction fraud and result in injustice because
20 Sovereign's and Sharma's actions as detailed herein were undertaken
21 in bad faith with knowledge of the harm to Plan participants and
22 beneficiaries that was nearly certain to result.

23 16. Defendant Kevin Gallagher is the Chief Financial Officer of
24 Sovereign. Plaintiffs are informed and believe and thereon allege that he is a
25 resident of California. Plaintiffs are further informed and believe and thereon
26 allege that at all relevant times Mr. Gallagher had and exercised control and
27 authority over Plan assets and is therefore a fiduciary with respect to the Plan under
28 ERISA.

1 17. Defendant David Tessers is the Director of Finance of Sovereign.
2 Plaintiffs are informed and believe and thereon allege that he is a resident of
3 California. Plaintiffs are further informed and believe and thereon allege that at all
4 relevant times Mr. Tessers had and exercised control and authority over Plan assets
5 and is therefore a fiduciary with respect to the Plan under ERISA.¹

GENERAL ALLEGATIONS

Self-Funded Health Plans

18. A self-funded health benefits plan is a form of self-insurance by which an employer uses its own funds to provide health benefits to employees. Rather than obtaining health insurance policies from an insurance carrier, the employer assumes direct responsibility for the cost of health benefits. Self-funded plans are advantageous to employers, as they generally are less expensive than traditional health insurance. In addition, the employer retains possession and control of the funds in trust that otherwise would be paid to an insurance carrier for traditional health insurance.

16 19. Of course, by opting for a self-funded plan, the employer assumes
17 certain obligations. The employer must pay the cost of covered benefits claims
18 under the self-funded health plan. Where the cost of those claims exceeds the
19 premiums paid by plan participants, it is the employer's obligation to make up the
20 shortfall.

21 20. In addition, ERISA requires that fiduciaries who manage plan assets
22 act solely, exclusively, and prudently in the interests and for the benefit of the plan
23 and plan participants.

The Sovereign Health Employee Benefits Plan

25 21. Sovereign offered health benefits to its employees, including Plaintiffs

20 ¹ Defendants Sovereign, Sharma, Gallagher and Tessers are referred to
27 collectively herein as the “Sovereign Defendants.” The Sovereign Defendants, the
Plan and Allied are referred to collectively herein as “Defendants.”

1 Kimberly Cusack-Acocella, Scott Langer, Michael Henry, Janice Smothers, and
2 Grace Oudin (collectively “Plaintiffs”), through its self-funded Sovereign Health
3 Employee Benefits Plan (the “Plan”). The Plan is an employee benefit plan within
4 the meaning of Section 2(3) of ERISA, 29 U.S.C. §1002(3).

5 22. Although Sovereign could have procured health insurance for its
6 employees, it instead opted to implement a self-funded plan, as it was financially
7 advantageous to the Company and its executives and owners.

8 23. The Plan Documents state that “[t]he benefits provided under the
9 terms of this Plan are purchased through Employer contributions. At the discretion
10 of the Company, Employees may be required to contribute on a payroll deduction
11 basis.” On information and belief, Sovereign never undertook to make
12 contributions to Plan assets from general corporate funds, but instead funded the
13 Plan—when it funded the Plan at all—exclusively through employee payroll
14 deductions earmarked as such. Sovereign represented to its employees that
15 through these premium payments the Plan would have sufficient funds to pay all
16 claims for covered health benefits under the Plan.

17 24. The Plan documents specifically identify Sovereign as the Plan
18 sponsor and Named Fiduciary.

19 **Defendants Induced Plaintiffs to Participate in the Plan Through Various**
20 **Representations**

21 25. Plaintiffs could have opted not to participate in the Plan, but instead to
22 purchase private insurance policies or otherwise secure health benefits.
23 Defendants induced Plaintiffs, and other Sovereign employees, to participate in the
24 Plan by representing that the Plan would fully and timely reimburse the cost of
25 covered claims. This was critically important to Plaintiffs.

26 26. Ms. Cusack-Acocella, for example, is a cancer survivor and a single
27 mother of two boys. She and her children have substantial and routine medical
28 expenses. Sovereign promised Ms. Cusack-Acocella medical benefits as part of

1 her compensation, and that promise was material to her decision to accept
2 employment with Sovereign. Had Defendants advised Ms. Cusack-Acocella at any
3 time that the Plan would not provide full payment of the benefits required by the
4 Plan, she would have opted out of the Plan and obtained alternative health
5 insurance. Messrs. Langer and Henry, Ms. Smothers, and Ms. Oudin likewise
6 opted to participate in the Plan with the expectation that it would provide the
7 benefits required by the Plan documents.

8 **Sovereign Failed To Fund the Plan, and all Defendants**

9 **Failed to Prudently Manage Plan Assets**

10 27. Sovereign made regular payroll deductions from each Plaintiff for the
11 putative purpose of funding the Plan, in some cases in amounts of over \$1,000 per
12 bi-weekly employee paycheck. These were effectively the “premiums” for
13 participation in the Plan, and were represented as such. Consequently, these
14 amounts were Plan assets that Defendants were obliged to hold in trust and
15 maintain and use for the benefit of the Plan.

16 28. Pursuant to the Plan and the arrangement between Sovereign and
17 Allied, Sovereign was to establish a dedicated bank account with sufficient funds
18 to cover all necessary benefits payments under the Plan. Sovereign was to fund
19 this account with the amounts deducted from employee paychecks and, to the
20 extent necessary, contribute sufficient additional funds to allow for full payment of
21 benefits.

22 29. Allied had control of this account and authority to make
23 disbursements from the account. As the claims administrator, Allied was
24 responsible for processing claims for health benefits, determining whether claims
25 were covered under the Plan and making payments.

26 30. Plaintiffs are informed and believe and thereon allege that Sovereign
27 failed adequately to fund the Plan. Instead, Sovereign retained the funds deducted
28 from its employee payroll. Plaintiffs are informed and belief and thereon allege

1 that the Sovereign Defendants misused Plan assets, engaged in self-dealing
2 transactions by commingling plan assets with Sovereign's general accounts, and
3 failed to administer the Plan in the interests of Plan participants.

4 31. In addition, Plaintiffs are informed and believe and thereon allege that
5 Defendant Sharma used Plan assets and other Sovereign funds for his own personal
6 use as detailed above.

7 **Defendants Have Failed To Make Payments for Health Benefits**

8 **As Required by the Plan**

9 32. Plaintiffs are informed and believe and thereon allege that in 2017,
10 Defendants ceased making any payments for covered claims under the Plan.
11 Sovereign, however, continued to make regular and routine payroll deductions
12 from its employees, identifying them as funds for the Plan. The Sovereign
13 Defendants did not disclose to Plaintiffs or its other employees that it had failed to
14 adequately fund the Plan or that the Plan had ceased paying claims. Consequently,
15 Plaintiffs and other employees continued to seek medical care and services with the
16 expectation that the costs of such care and services would be covered and paid for
17 as provided by the Plan.

18 33. Plaintiffs are informed and believe and thereon allege that Allied was
19 aware that Sovereign had not adequately funded the Plan. Allied was aware that
20 the Plan had ceased making payments for covered claims, as it was Allied's
21 responsibility to 1) determine whether claims were in fact covered and 2) pay the
22 covered claims.

23 34. Allied at no time advised Plaintiffs or other Plan participants that
24 Defendants had ceased paying covered claims. To the contrary, Allied routinely
25 communicated to Plaintiffs that the Plan had in fact paid claims that Allied knew
26 Defendants had not paid. This induced Plaintiffs to continue to seek medical care
27 with the expectation that covered claims would be reimbursed. Allied was at all
28 times aware of the funding shortfall, and consequent non-payment of covered

1 claims, as Allied had control of the (unfunded) account from which such payments
2 were to be made.

3 35. As a result of Defendants' breaches of their fiduciary duties,
4 Defendants have failed to pay more than \$1.1 million in covered medical claims
5 under the Plan. Defendants do not dispute or deny that these claims are covered by
6 the Plan. They simply have failed and refused to pay these covered claims.

7 36. As a result, Plaintiffs have received collections and/or past-due
8 notices from multiple medical providers.

9 37. Plaintiffs are informed and believe and thereon allege that
10 Defendants' failure to pay covered claims is ongoing, and thus the harm to
11 Plaintiffs and other Plan participants is continuing and increasing by the day.

12 **Defendants Have Failed to Notify Plan Participants of Their Failure to**
13 **Pay Claims, Leaving Them Vulnerable to Further Financial Liability**
14 **and Medical Insecurity**

15 38. Plaintiffs are informed and believe and thereon allege that many
16 Sovereign employees remain unaware of Defendants' conduct. For example, any
17 Plan participants who have not sought medical care or treatment in the time since
18 Defendants ceased making required payments for health benefits covered under the
19 Plan, would have no basis to know that Defendants have breached their fiduciary
20 duties and stopped making payments for covered health benefits under the Plan.
21 Such employees may seek medical care or treatment with the expectation that
22 covered benefits will be paid for consistent with the terms of the Plan. Defendants
23 know that this is not the case, and that Defendants have failed to pay and continue
24 to fail to pay covered claims, but have provided no notice to Plan participants of
25 these facts.

26 39. In addition, Plaintiffs and all other Plan participants have been
27 deprived of their premium payments without having received the promised health
28 benefits. This applies equally to Plan participants who have had covered claims go

1 unpaid and to those who have not suffered unpaid claims. Participants who have
2 not obtained medical services under the Plan in the period since Defendants ceased
3 paying covered claims have nonetheless been harmed, because they have been
4 compelled under false pretenses to pay for health coverage that Defendants were
5 not actually providing. Defendants continued to confiscate and use for their own
6 benefit employee premium payments, without any intention of using those funds
7 for their stated purpose of providing health benefits under the Plan.

8 **CLASS ACTION ALLEGATIONS**

9 40. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of
10 Civil Procedure on behalf of a proposed class including all participants and former
11 participants in the Plan to the present day.

12 41. Specifically excluded from the proposed class are Defendants Sharma,
13 Gallagher and Tessers.

14 42. The claims set forth herein as properly maintained as a class action
15 under Federal Rule of Civil Procedure 23 because all elements of Rule 23(a) are
16 satisfied and one or more of the Rule 23(b) factors is satisfied. Defendants have
17 acted or refused to act on grounds that apply generally to the class, such that
18 declaratory and injunctive relief is appropriate for the class as a whole, common
19 questions of law and fact predominate over any questions affecting only individual
20 class members, and a class action is superior to other available methods for fairly
21 and efficiently adjudicating the controversy.

22 43. **Numerosity.** The members of the class are so numerous that
23 individual joinder is impracticable. Upon information and belief, Plaintiffs allege
24 that the proposed class contains at least 500 members. The precise number and
25 identities of all class members is unknown to Plaintiffs, but is known to
26 Defendants. Accordingly, it will be possible to notify the class of the pendency of
27 this action by mail, electronic mail, notice or otherwise.

28 ///

1 44. **Commonality and predominance of common questions of law and**
2 **fact.** Common questions of law and fact exist as to all members of the proposed
3 class, and these questions predominate over any individualized questions. These
4 common questions of law and fact including, but are not limited to, the following:
5 a. Whether Defendants breached their fiduciary duty by failing to
6 pay covered claims under the Plan;
7 b. Whether Defendants breached their fiduciary duty by failing to
8 discharge their duties with respect to the Plan solely in the interest of participants
9 and beneficiaries, and for the exclusive purposes of providing benefits to
10 participants and their beneficiaries and defraying reasonable expenses of
11 administering the Plan;
12 c. Whether Defendants breached their fiduciary duty by failing to
13 ensure that Plan assets were prudently managed;
14 d. Whether Defendants breached their fiduciary duty by failing to
15 notify Plan participants that Defendants had ceased paying covered claims;
16 e. Whether Defendants breached their fiduciary duty by
17 misrepresenting to Plan participants that the Plan had paid amounts that
18 Defendants knew had not been paid and for which no funds were available to pay;
19 f. Whether Defendants are Plan fiduciaries;
20 g. Whether Sovereign is the alter ego of Sharma;
21 h. Whether Defendants violated ERISA;
22 i. Whether Plaintiffs and the proposed class are entitled to
23 declaratory, injunctive and/or other equitable relief, pursuant to ERISA or at
24 common law, to remedy defendants' breaches of fiduciary duty, wrongful, unfair,
25 and unlawful conduct as alleged herein, including without limitation an order
26 requiring payment of all unpaid claims for covered health benefits and restoration
27 to Plaintiffs and/or the Plan of all premium amounts deducted from Plaintiffs'
28 paychecks during the relevant period.

1 45. **Typicality.** Plaintiffs' claims are typical of the claims of the other
2 proposed Class members, in that Defendants' breaches of their fiduciary duties
3 impacted all Plan participants in the manner described above, including Plan
4 participants whose claims have gone unpaid as well as Plan participants who have
5 not yet suffered unpaid claims but who have had their wages deducted for Plan
6 premium payments when no functional Plan existed.

7 46. **Adequacy of representation.** Plaintiffs will fairly and adequately
8 protect the interests of the Class. Plaintiffs have retained counsel experienced in
9 complex litigation, including under ERISA, and Plaintiffs and their counsel intend
10 vigorously to prosecute this action. Plaintiffs and their counsel have no interests
11 adverse to those of the other proposed Class members.

12 47. **Superiority.** A class action is superior to individual actions for
13 achieving fair and efficient adjudication of this controversy. The financial and
14 other detriment suffered by the Plan, the Plaintiffs and other members of the
15 proposed class is relatively small compared to the burden and expense that would
16 be required to litigate their claims individually against Defendants. Thus it would
17 not be possible to redress effectively the misconduct described above through
18 individual actions. Further, individual actions would impose a greater burden on
19 the Courts and all parties, as well as the risk of inconsistent judgments arising from
20 the same or similar facts. Class litigation provides for the efficient adjudication of
21 common issues in a single proceeding, and there are issues of manageability that
22 would preclude individual litigation.

23 48. Class certification is also appropriate because:

24 a. the prosecution of separate actions by individual class members
25 would create a risk of inconsistent or varying adjudication with respect to individual
26 class members that would establish incompatible standards of conduct for
27 Defendants;

28 b. the prosecution of separate actions by individual class members

1 would create a risk of adjudications with respect to them that would, as a practical
2 matter, be dispositive of the interests of other class members not parties to the
3 adjudications, or substantially impair or impede their ability to protect their
4 interests; and

5 c. Defendants have acted or refused to act on grounds generally
6 applicable to the class as a whole, thereby making appropriate final declaratory,
7 injunctive or other equitable relief with respect to the members of the class as a
8 whole.

9 49. Alternatively, certain issues relating to Defendants' liability may be
10 certified pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure.

11 **FIRST CLAIM FOR RELIEF**

12 **Breach of Fiduciary Duty Against All Defendants**

13 **(ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2))**

14 50. Plaintiffs incorporate and re-plead by this reference the allegations of
15 paragraphs 1 through 49, as though fully set forth herein.

16 51. The Plan documents identify Sovereign as the Plan Administrator and
17 the Plan's Named Fiduciary. In addition, the Sovereign Defendants and Allied
18 were responsible for making and did make discretionary decisions regarding,
19 among other things, Plan administration, the evaluation of whether benefits claims
20 were covered under the Plan, and the disbursement of Plan benefits and Plan
21 assets. The Sovereign Defendants and Allied also had and exercised control over
22 Plan assets. Accordingly, the Sovereign Defendants are and acted as fiduciaries of
23 the Plan.

24 52. As fiduciaries of the Plan, the Sovereign Defendants and Allied had
25 the duties set forth in in ERISA section 404, 29 U.S.C. § 1104, including but not
26 limited to a duty of loyalty to the Plan and Plan participants, as well as duties not to
27 make misrepresentations to Plan participants; to discharge their duties solely in the
28 interests of Plan participants and their beneficiaries and for the exclusive purpose

1 of providing benefits to them or defraying reasonable expenses of administering
2 the Plan; to discharge their duties with the care, skill, prudence, and diligence
3 under the circumstances then prevailing that a prudent man acting in a like capacity
4 would use in the conduct of an enterprise of a like character and with like aims;
5 and to discharge their duties in accordance with the documents and instruments
6 governing the Plan.

7 53. Defendants breached their fiduciary duties by, among other things:
8 a. failing to pay covered claims under the Plan;
9 b. failing to ensure the Plan was adequately funded;
10 c. failing to ensure that Plan assets were prudently managed;
11 d. misappropriating and misusing Plan assets;
12 e. failing to notify Plan participants that Defendants had ceased
13 paying covered claims; and
14 f. misrepresenting to Plan participants that the Plan had paid
15 claims that Defendants knew had not been paid and for which no funds were
16 available to pay.

17 54. As a result of such breaches, Defendants have caused monetary loss to
18 Plaintiffs and the Plan for which Defendants are individually liable. Accordingly,
19 Plaintiffs bring this action on behalf of themselves and all others similarly situated,
20 and on behalf of and for the benefit of the Plan.

21 **SECOND CLAIM FOR RELIEF**

22 **For Equitable Relief Against All Defendants**

23 **(ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3))**

24 55. Plaintiffs incorporate and re-plead by this reference the allegations of
25 paragraphs 1 through 54, as though fully set forth herein.

26 56. Plaintiffs are entitled to appropriate equitable relief to ensure the
27 protection of their rights going forward, avoid continued malfeasance with respect
28 to Plan assets, and prevent unjust enrichment of Defendants by virtue of their

1 conduct described above constituting breaches of fiduciary duties owed to Plan
2 participants and/or knowing participation in such breaches.

3 57. In addition to the conduct described above, Plaintiffs are entitled to
4 appropriate equitable relief to redress Defendants' violations of, or knowing
5 participation in violations of, ERISA's prohibition on transactions set forth in
6 ERISA Section 406(a), 29 U.S.C. § 1106(a), through, at a minimum, the transfer of
7 plan assets to, use of plan assets by or for the benefit of parties in interest (as
8 defined by ERISA).

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs pray for relief as follows:

- 11 1. For an order certifying the action as a class action under Rules
12 23(b)(2) and (b)(3);
- 13 2. For an order appointing plaintiffs as class representatives and
14 plaintiffs' counsel as class counsel;
- 15 3. For an order declaring that that Defendants violated the terms of the
16 Plan and the rights of Plaintiffs and the Class thereunder by a) failing
17 to pay the full amount of benefits due under the Plan; b) failing to
18 disclose to Plaintiffs and the Class that the Plan had ceased providing
19 payment of covered health benefits; c) failing to adequately and
20 prudently fund, manage and administer the Plan; d) failing to hold
21 Plan assets in trust; and e) misusing and misappropriating Plan assets.
- 22 4. For an order requiring Defendants to pay all benefits due pursuant to
23 the terms of the Plan, including without limitation a) all approved
24 claims for which no payment has been made, and b) any interest or
25 penalties that have been suffered by Plaintiffs and the class as a result
26 of the Defendants' failure to make timely payments;
- 27 5. For an order requiring Defendants restore to Plaintiffs and the
28 proposed class and/or the Plan premium contributions collected;

